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**Commercial Erectors, Inc. and International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers, Local 48, AFL-CIO.**  
Case 17-CA-20046

August 31, 2004

**DECISION AND ORDER**

BY MEMBERS LIEBMAN, WALSH, AND SCHAUMBER

On June 6, 2000, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below, and to issue the attached Order.

For the reasons explained below, we find merit in the General Counsel's exceptions to the judge's failure to find that the Respondent violated Section 8(a)(1) of the Act by threatening not to hire four union-affiliated job applicants, and violated Section 8(a)(3) and (1) by refusing to hire them.<sup>1</sup>

**I. FACTS**

The Respondent, headquartered in Manassas, Virginia, erects steel buildings on a contract basis. It contracted to build a warehouse in Duncan, Oklahoma, with project construction occurring between early December 1998 and late April 1999. The Respondent had no collective-bargaining relationship with any union. At all material times, the Respondent's supervisor for the Duncan project, Jack Tunnell, was undisputedly in charge of hiring at the site.

To recruit employees for the Duncan project, the Respondent on four occasions placed ads for ironworkers in two local newspapers: The Sunday Oklahoman on November 8, 1998, and January 10, 1999; and The Daily Oklahoman on December 10, 1998, and January 5, 1999.<sup>2</sup>

<sup>1</sup> In his exceptions, the General Counsel asks the Board to order interest on backpay owed the discriminatees to be calculated on a daily compounded basis. We are not prepared to deviate from our current practice at this time. See *Accurate Wire Harness*, 335 NLRB 1096 fn. 1 (2001).

<sup>2</sup> All dates are in 1999, unless otherwise specified.

**A. The December 10, 1998 Visit**

John Norman, an organizer for Iron Workers Local 48 in Oklahoma City, noticed the Respondent's November 8 and December 10, 1998 ads. On the latter date, Norman recruited three unemployed members of Local 48 (Harold "Bud" Rosier, Monroe Neal, and Samuel L. Rowland) to join him in immediately applying for work at the Duncan project. Norman and each of his recruits (the Norman Four) had at least 25 years of ironwork experience. The four men went to the Duncan site, located Tunnell, and asked for jobs as ironworkers. On this and two later occasions, Norman wore a concealed tape recorder and recorded the conversations with Tunnell.<sup>3</sup>

Norman asked Tunnell what the Respondent was paying ironworkers, and Tunnell said between \$10 and \$14 an hour. Norman said "[w]e'll work for that," and all four applicants indicated that they were ironworkers of considerable experience. Tunnell said that new employees he had already hired were scheduled to start work the following Monday (December 14), and that he would need "about another week" before he hired anyone else. He suggested that the Norman Four, "at the end of next week, come by and see me," but then asked "if there's a way you can leave me your number and I can call you."

After some additional conversation about the project, the following exchange occurred:

Norman: Well now we're all union ironworkers, and we'll make you good hands, that's no problem.

Tunnell: Now we're nonunion.

Norman: That's all right. We'll work for what you pay . . . and we'll try to organize your company too, if we can.

Tunnell: You can forget that, I'll tell you that right now.

Norman told Tunnell that Local 48's business agent could provide him with all the "qualified hands" he needed, to which Tunnell replied, "No. Reason I say that, bud, they tried it [in Virginia] out of Local 5 there." A few moments later, the following exchange occurred:

Norman: We'll make you some good hands.

Tunnell: What the union pays out here I have no idea or nothing else.

Norman: We could work something out with the union if you run into a tight here, you know, get you some

<sup>3</sup> The General Counsel introduced the tapes and written transcripts of the conversations with Tunnell described below as exhibits. Both parties have cited from the transcripts in their briefs, and there is no dispute as to their accuracy.

hands out, you know Fluor's got that job going on over in Lawton.

Tunnell: I'll be honest with you, the guy that owns the company, he don't like the union to start with.

Norman: Who's that.

Tunnell: Bubbie Henderson. . . . He is—he don't like the union the way they done around where we're at [Virginia].

Tunnell went on to state his own negative view of the Ironworkers local in Virginia, where he lived, and asked why the Union would let Norman and the other three work on a nonunion project. Norman replied, "Because we're volunteer organizers. And I am an organizer." A few moments later, Norman asked whether it would help for him to talk with Henderson. Tunnell responded:

[I]f you talked to him, he wouldn't hire you. I'm just being honest. . . . He is strictly against the Union, and this is all from back there [Virginia].

The applicants prepared to leave, and Tunnell again told them to leave their names and contact information, adding that "I have nothing against unions or nonunion." Norman repeated that the Union had "good hands" available, and Tunnell said:

Like I said, I'll be more than glad to, you know it don't matter to me. The only thing I ask if I hire you, don't start trying to screw up all the others. I mean you can ask them, I don't care if you ask them. I mean it's up to them. But as far as the company goes, they will not go union.

In parting, Norman said, "If you can use us give us a call," and Tunnell repeated that it would "be a little while," saying that one new hire was supposed to start "tomorrow" (a Friday) and another on "Monday." The Norman Four then left the site. The judge found from the credited evidence that all four applicants left their names and complete phone numbers with Tunnell.

#### *B. The January 7, 1999 Visit*

For the next 4 weeks, none of the Norman Four heard from Tunnell. On December 11, 1998, however, the day after their visit, Tunnell hired Keith Dixon for an ironwork position. Dixon had not previously applied or communicated with Tunnell but was hired as a "walk-in" (an applicant who came to the site on a day when Tunnell needed more employees). His application indicated no ironwork experience, and Tunnell admitted that he did not question Dixon about his experience. Tunnell hired two other applicants on Monday, December 14, 1998, and another on Wednesday, January 6. The Respondent's records classified all four of these new hires as "iron-

workers." In addition, the Respondent's third ad for ironworkers appeared in the *Daily Oklahoman* on January 5.

On Thursday, January 7, the Norman Four returned to the Duncan jobsite and again approached Tunnell. On this occasion, owner Henderson was on the site. After greeting Tunnell, Norman said he had seen the January 5 ad but had not heard from Tunnell, to which Tunnell replied:

It'll probably be next week. . . . I've still got your names. . . . I've had a lot of guys coming in. (Inaudible.) I've got everybody's names down. Quick as I can, I'll give you a call.

Monroe Neal made a reference to Virginia. At that point Henderson, either joining the group or already present, entered the conversation. After some banter about Virginia, Henderson asked Rosier and Rowland their names, which they gave. Norman again identified all four applicants as "union ironworkers" and said, "We've got some good hands here. . . . You run into a problem, we can help you out I'm sure." Henderson immediately responded, "We can't use union help." He then added, "I mean we can hire you, but we can't pay the union benefits." Norman said that would be acceptable. After further assuring Henderson that he and the others would make "good hands," Norman said that "Jack's got our number and everything," and the conversation ended.

#### *C. The January 20, 1999 Visit*

From January 7 to 20, as before, none of the Norman Four heard from Tunnell. On January 10, however, the Respondent placed its fourth ad for ironworkers in the *Sunday Oklahoman*. Over the 9 days after placing the ad, Tunnell hired 10 more employees, classifying each as an "ironworker."

On Wednesday, January 20, Norman returned to the Duncan site a third time, this time alone. He greeted Tunnell and again observed that "you never called us." The conversation continued:

Tunnell: I ain't needed nobody yet, but I'm going down the list that I had with your names. You got about one, two, about four more ahead of y'all yet.

Norman: O.K. Looks like you moving all pretty good.

Tunnell: But, I've got everybody I need right now; so I ain't calling nobody.

Norman: O.K.

Tunnell: So, there are about 4 guys ahead of y'all yet and that's all. Then y'all are next. I tell you, I write down everyone's name as they come, that way I don't slight nobody.

Norman: Right. How many you got working for you now?

Tunnell: About 19–20.

Norman asked how many ironworkers Tunnell would need at the project's busiest stage. Tunnell said "about 20," but added that he did not know how many current employees would quit before that stage. Tunnell repeated that the Norman Four had "about 4 more ahead of y'all yet." Norman observed that the Respondent, if it had signed with the Union, would have had all the qualified ironworkers it needed. Tunnell replied:

I'll tell you where I am, seriously. The Union is fine. Personally, myself, I don't like them. You know why? The way they done us up in DC.

When Norman assured Tunnell that Local 48 was not like the local in Virginia, Tunnell said he was not saying it was, but that he (Tunnell) could make more money nonunion than he could working union, and that he had "nothing against union." The conversation ended with Norman again asking Tunnell to "give us a call if you need us." Tunnell replied, "I sure will. Like I say, I've got your names. I ain't slighting nobody."

Again, none of the Norman Four heard from Tunnell after Norman's third visit. During the remainder of January, Tunnell hired four more employees, none of whom was on the handwritten "master list" of applicants (a copy of which the Respondent introduced at the hearing) that Tunnell testified he used to call applicants who left their names and phone numbers with him. Each of these four hires, moreover, was classified in the Respondent's records as an "ironworker." From February 1 to April 6 (the date of the last new hire), Tunnell hired 26 additional employees, all of whom were also classified as "ironworkers." At least five of the applicants whom Tunnell hired in December 1998 and January 1999 (Keith Dixon, Sean Jarvis, Sean Scarbrough, Reagan Burge, and James Mathers) had had no previous ironwork experience. The record does not indicate, and the Respondent does not contend, that any of the other employees Tunnell hired had stronger ironwork qualifications than the Norman Four.

## II. ANALYSIS

### A. Threat Not to Hire

We agree with the General Counsel that Tunnell, on December 10, 1998, unlawfully threatened not to hire the Norman Four because of their union affiliation. His statements were made in response to the applicants' applications for employment and, in their totality, would reasonably be taken to indicate that the Respondent

would refuse to hire union supporters, including the Norman Four.<sup>4</sup>

In the judge's view, Tunnell was only trying to "alert" the Norman Four not to talk to Henderson, because Henderson "did not like unions and it was [Henderson] who would not hire them." We disagree. Even if the judge were correct that Tunnell was only trying to warn the applicants of Henderson's bias rather than his own, the warning violated Section 8(a)(1). Such a statement by a supervisor is attributable to the employer. E.g., *KOFY, Operator of KOFY TV-20*, 332 NLRB 771, 790 fn. 10 (2000); *Aero Ambulance Service, Inc.*, 327 NLRB 639, 645 (1999), *enfd.* 203 F.3d 816 (3d Cir. 1999) (table). Tunnell thereby conveyed a threat not to hire the Norman Four that was attributable to the Respondent even if, as the judge apparently assumed, he would not have made the threat on his own behalf. Further, we find that the judge's apparent assumption is not supported by the record. It is uncontested that Tunnell, not Henderson, was in charge of hiring at the jobsite. As we find next, it was Tunnell, not Henderson, who unlawfully refused to hire the applicants.

### B. Refusal to Hire

In order to establish an unlawful refusal to hire, the General Counsel must show that the Respondent was hiring, that the applicants had the relevant training and experience for the jobs at issue, and that antiunion animus was a motivating factor in the employer's decision not to hire. *FES*, 331 NLRB 9 (2000). If the General Counsel makes this showing, the employer must show that it would have made the same hiring decisions absent the applicants' union affiliation.

There is no dispute that the Respondent was hiring, that the Norman Four had the relevant training and experience for the Respondent's ironwork job openings, and that Tunnell was informed of their union affiliation from the outset. The only element in dispute is motive. Contrary to the judge, we conclude that the General Counsel has shown that antiunion bias was a motivating factor in Tunnell's failure to hire any of the Norman

<sup>4</sup> We also find that, in the prospective-hiring context in which Tunnell made his comments, his statements that "[y]ou can forget" organizing the Respondent, that "the guy that owns the company . . . don't like the union to start with" and "is strictly against the union," and his pointblank refusal to accept any union referrals, were each an independent threat not to hire union supporters that violated Sec. 8(a)(1). Moreover, we find that Tunnell's statement to "forget" about organizing and his prediction that the company "will not go union" were unlawful threats that attempts to unionize the Respondent would be futile.

Member Schaumber finds only that Tunnell's statements to the applicants on December 10, viewed as a whole, unlawfully conveyed a threat not to hire them because of their union activities and affiliation.

Four. While we adopt the judge's credibility findings (which consistently disfavored Tunnell) and his findings of fact, we nonetheless disagree with the inferences he drew from those findings. In our view, the judge's fact and credibility findings support a finding that the Respondent's refusal to hire the four applicants was unlawfully motivated.

First, Tunnell's unlawful threat to the Norman Four on December 10, 1998, demonstrated an anti-union bias that motivated the Respondent to avoid hiring union supporters.

Second, the Respondent failed to offer employment to any of the Norman Four during the 5-month period, even though they were at least as qualified as the other 44 applicants Tunnell hired as ironworkers after December 10, 1998, and, as described above, they were more qualified than at least five. The four applicants also visited the site twice (and Norman three times), and on their initial visit left their phone numbers with Tunnell at his request. The Respondent, however, failed to hire them even though it placed two additional newspaper ads for ironworkers within a month after that visit. Particularly in light of Tunnell's unlawful threat that they would not be hired, the Respondent's hiring actions strongly suggest that it was motivated by the Norman Four's union affiliation and their stated intent to organize the site. *See Richard Mellow Electrical Contractors*, supra, 327 NLRB at 1113-1115; *Fluor Daniel, Inc.*, 304 NLRB 970, 970-971 (1991), enf'd. 976 F.2d 744 (11th Cir. 1992).

Third, as the judge found, Tunnell made "misleading or even false statements" to the Norman Four. The day after telling them he would have no work available for them for another week, he hired another walk-in applicant who had no previous ironwork experience. In addition, while Tunnell testified that he gave first hiring preference to "walk-ons," and that the best time for job seekers to visit the site was early Monday morning, he never communicated this information to the Norman Four. Instead, he repeatedly promised to call them when he had openings. He even reassured Norman during his third visit that "I've still got your names, I ain't slighting nobody" and that "I'm going down the list." Yet, as the judge observed, over the 7 days after that visit Tunnell hired four applicants who were not on his "master list." In fact, after the December 10, 1998 visit, Tunnell hired 41 applicants who were not on his "master list" without calling any of the Norman Four.<sup>5</sup> Given the credited evi-

dence, the only reasonable explanation for the discrepancy between what Tunnell told the Norman Four and his hiring actions is that he never had any intention of hiring them.

The General Counsel having met his evidentiary burden, the Respondent had the consequent burden of showing that the Norman Four would not have been hired even absent their union activity or affiliation. The evidence and the judge's credibility findings preclude such a showing.

First, Tunnell—who was in complete charge of hiring and was the Respondent's only witness concerning hiring decisions at the Duncan site<sup>6</sup>—testified variously that the Norman Four did not include area codes with their phone numbers; that he had already "offered employment" to several applicants when the Norman Four first came to the site on December 10, 1998; and that he only "hire[d] employees as I need them."<sup>7</sup> The judge, however, discredited each of these assertions. In fact, the judge found that Tunnell was "generally not credible" and that he "appeared to be giving himself all the leeway he might need."

Second, Tunnell testified that on January 29, he relied on his "master list" of names to call applicants. The judge, however, refused to credit the authenticity of the document the Respondent introduced as the purported list, finding it "unreliable" and "subject to easy manipulation." He also found a "suggestion" from the document that the names of the Norman Four were placed at the bottom of the list "only when [it] was assembled in response to the unfair labor practice charge filed in this case."<sup>8</sup>

Third, as observed above, Tunnell testified that he gave first hiring preference to applicants who came to the site early on the mornings when he actually needed more employees, particularly on Mondays. The Respondent emphasizes that the Norman Four never visited the site early in the morning. Again, however, Tunnell did not reveal this purported hiring priority to the Norman Four, but rather assured them he would contact them as soon as he had openings.

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while still telling Norman that "[y]ou got about one, two, about four more ahead of y'all yet."

<sup>6</sup> The Respondent's vice president, Matt Henderson, testified but confirmed that he had no role in hiring decisions.

<sup>7</sup> Contrary to this "hiring-as-needed" claim, Tunnell hired Dixon, to whom he had given no previous "moral commitment," only 1 day after he told the Norman Four at their first visit that he would not need additional employees for another week. There is no evidence that circumstances bearing on the Respondent's hiring requirements had changed from the previous day.

<sup>8</sup> In any case, contrary to Tunnell's assertion that he was hiring on a first-come basis from the "master" list, only three out of the 28 individuals on Tunnell's "master" list were hired for the Duncan project.

<sup>5</sup> Other statements Tunnell made to the Norman Four were also false. On December 10, 1998, for example, he indicated that he had two other applicants already scheduled to start work. Six weeks later, however, he admitted that he had hired "about 19-20" new employees,

A respondent's shifting explanations for its failure to hire alleged discriminatees support an inference of unlawful motivation. See *Richard Mellow Electrical Contractors*, supra, 327 NLRB at 1115 fn. 18; *Martel Construction*, 302 NLRB 522, 530 fn. 18 (1991), enf. 35 F.3d 571 (9th Cir. 1994); *PIE Nationwide*, 282 NLRB 1060, 1064–1065 (1987), enf. 894 F.2d 887 (7th Cir. 1990). Moreover, the judge's fact and credibility findings—including his clearly expressed inference that the Respondent fabricated evidence—consistently indicate that the Respondent's real motive was unlawful. *Fluor Daniel*, 304 NLRB at 970; *Clark & Wilkins Industries*, 290 NLRB 106, 107 (1988), affd. 887 F.2d 308 (D.C. Cir. 1989).

Finally, the Respondent contends that the Norman Four were union “salts” who were looking not for jobs but for grounds to file charges with the Board. This, according to the Respondent, was why the Norman Four came to the site only three times over a 5-month period. The judge agreed to the extent of finding that “the Norman Four never really tested CEI by making frequent appearances at the jobsite seeking work,” and that they “failed to arrive when CEI was hiring or taking applications.”

As discussed above, however, the Respondent was seeking applications and hiring during the relevant period. Moreover, Tunnell's repeated assurances that he would call the applicants as soon as he had called the applicants ahead of them on his “master list” reasonably would have dissuaded the Norman Four from coming to the site frequently. Moreover, the four applicants at no time engaged in disruptive, intimidating, or disrespectful behavior.<sup>9</sup>

For all of these reasons, the judge's fact and credibility findings establish that the Respondent failed to hire the Norman Four at least in part due to antiunion animus, and also negate the Respondent's asserted defense that it would not have hired them even in the absence of their union affiliation. It is also clear from the record that after they applied, but no later than January 5, 1999, the

Respondent had at least four job openings for which they were qualified.<sup>10</sup>

We therefore find that the Respondent refused to hire the Norman Four by or after that date, in violation of Section 8(a)(3) and (1), and that all four discriminatees are entitled to back pay and reinstatement. We will issue a remedial order accordingly.

#### ORDER

The National Labor Relations Board orders that the Respondent, Commercial Erectors, Inc., Manassas, Virginia, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Stating or implying to job applicants that applicants who have union affiliations or who indicate that they intend to organize the Respondent's employees will not be hired.

(b) Failing and refusing to hire job applicants because they have union affiliations or because they indicate that they intend to organize the Respondent's employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer John Norman, Harold “Bud” Rosier, Monroe Neal, and Samuel L. Rowland immediate employment as ironworkers at its worksite in Duncan, Oklahoma, without prejudice to their seniority or any other rights and privileges, if necessary terminating the service of employees hired in their stead; and if such employment no longer exists, substantially equivalent employment.

(b) Make John Norman, Harold “Bud” Rosier, Monroe Neal, and Samuel L. Rowland whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay is to be computed on a quarterly basis as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any and all references to its failure to hire John Norman, Harold “Bud” Rosier, Monroe Neal, and Samuel L. Rowland.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, So-

<sup>9</sup> Contrast *Heiliger Electric*, 325 NLRB 966 (1998) (applicants openly videotaped papers on employer's desk, refused to stop doing so, and refused to leave when asked, thereby creating an environment “sufficiently intimidating and disrespectful” to privilege employer not to hire them).

Tunnell's “misleading or even false statements” to the discriminatees distinguish this case from *Irwin Industries*, 325 NLRB 726 (1998), cited by the Respondent. Moreover, the fact that Norman was recording his conversations with Tunnell was unknown to Tunnell and, therefore, could not constitute harassment as in *Delta Mechanical, Inc.*, 323 NLRB 76, 78 (1997), also cited by the Respondent.

<sup>10</sup> One slot was available on December 11, 1998, when Tunnell hired Dixon; two others on December 14, when he hired two other applicants; and at least one on January 5, 1999, when the Respondent's third ad for ironworkers appeared in the Daily Oklahoman.

cial Security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities and all other places where notices customarily are posted, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 10, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

Dated, Washington, D.C. August 31, 2004

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Wilma B. Liebman, Member

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Dennis P. Walsh, Member

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS  
APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

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<sup>11</sup> If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT state or imply to job applicants that applicants who have union affiliations or indicate that they intend to organize our employees will not be hired.

WE WILL NOT fail or refuse to hire job applicants because they have union affiliations or because they indicate that they intend to organize our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer John Norman, Harold "Bud" Rosier, Monroe Neal, and Samuel L. Rowland immediate employment as ironworkers at our worksite in Duncan, Oklahoma, without prejudice to their seniority or any other rights and privileges, if necessary terminating the service of employees hired in their stead; or, if such employment no longer exists, substantially equivalent employment elsewhere.

WE WILL make John Norman, Harold "Bud" Rosier, Monroe Neal, and Samuel L. Rowland whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL remove from our files any and all references to our failure and refusal to hire John Norman, Harold "Bud" Rosier, Monroe Neal, and Samuel L. Rowland.

COMMERCIAL ERECTORS, INC.

*Stanley D. Williams, Esq.* (NLRB Region 17), Overland Park, Kansas, for the General Counsel.

*John Norman, Org.* (Local 48), Oklahoma City, Oklahoma, for the Charging Party.

*Frank L. Kollman, Esq.* and (brief only) *Randi Klein Hyatt, Esq.* (Kollman & Sheehan), Baltimore, Maryland, for the Respondent, Commercial Erectors.

### DECISION

#### STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is an open salting case. Agreeing with Commercial Erectors (CEI, usually), I find that statements by Foreman Jack Tunnell on December 10, 1998 were not coercive threats under Section

8(a)(1) of the Act, and that CEI, through Tunnell, did not, since December 10, 1998, unlawfully refuse to consider for hire and/or hire employee-applicants John Norman, Monroe Neal, Harold Rosier, and Sam Rowland because of their affiliation with and support of Iron Workers Local 48. Accordingly, I shall dismiss the complaint.

I presided at this 2-day trial in Oklahoma City, Oklahoma, on October 26-27, 1999. Trial was pursuant to the April 2, 1999 complaint and notice of hearing (complaint) Issued by the General Counsel of the National Labor Relations Board through the Acting Regional Director for Region 17 of the Board. The April 2 complaint is based on a charge filed (and later amended) against Commercial Erectors, Inc. (CEI or Respondent) on February 17, 1999 by the International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers, Local 48, AFL-CIO, (Union or Local 48).<sup>1</sup> The situs of the dispute here was a construction site at Duncan, Oklahoma. CEI's corporate office is located at Manassas, Virginia, and some 95 percent of its work is done in the mid-Atlantic region. (2:342-343)<sup>2</sup>

With one qualification, the pleadings establish that the Board has both statutory and discretionary jurisdiction over CEI and that CEI is a statutory employer. Admitting all the allegations save the dollar amount of goods purchased and received at the Duncan construction site, by its answer to the complaint, CEI adds that it does not deny jurisdiction. Interpreting these pleadings that CEI admits jurisdiction, but just not through its Duncan construction site, I find that jurisdiction is admitted by CEI through its purchases across the Virginia state line during the 12 month period preceding the April 2, 1999 complaint. At trial, the parties stipulated, for the purposes of this proceeding, that the Union is a statutory labor organization. (1:6).

The complaint alleges two counts of independent 8(a)(1) violations (December 10, 1998 threats by Site Supervisor Jack Tunnel of (1) no consideration for employment because of union affiliation, and (2) futility for employees/applicants to select the Union as their bargaining representative), and one count of an 8(a)(3) violation by refusing, since about December 10, 1998, "to consider for hire and/or hire employee-applicants John Norman, Monroe Neal, Harold Rosier, and Sam Rowland." CEI denies. The spelling of Rosier's name is as corrected at trial (1:7).

For the first of the Government's five witnesses, the General Counsel called John T. Norman, a staff organizer for Iron Workers Local 48 of Oklahoma City. (1:26) Norman was followed by Local 48 member Harold "Bud" Rosier of Marlow, Oklahoma (1:162-163),<sup>3</sup> Samuel L. Rowland of Newcastle, Oklahoma, a "boomer" (a traveler from another local, 1:42) from Local 704 of Chattanooga, Tennessee (1:186-189), Local

48 member Monroe Neal of Norman, Oklahoma (1:207-209), and FRE 611(c) witness Jack Tunnell of Fairfax, Virginia, who served as CEI's project supervisor at the Duncan jobsite (2:240-242). After the General Counsel rested the Government's case-in-chief (2:315), CEI called Foreman Tunnell, Vice President Matt Henderson (who had the title of General Manager during the relevant time) of Culpepper, Virginia (2:340-341), and rested (2:348). There was no rebuttal stage. (2:348)

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel (whose brief did not include a proposed order) and by CEI, I make these:

#### FINDINGS OF FACT

##### A. Overview

As reflected by an atlas, Duncan, Oklahoma is situated about 80 miles or so south by southwest of Oklahoma City. CEI, a Virginia-headquartered corporation engaged in the business of erecting steel buildings (pleadings; 2:342), contracted to build a Family Dollar distribution warehouse in Duncan. (1:115; 2:343) The projected time for the construction was from about early December 1998 into April 1999. (2:242-243) So far as Tunnell is aware, CEI has never had a collective bargaining relationship with any union during Tunnell's 30 plus years with the company. (2:304)

Elmer "Bubbie" Henderson is the owner and president of CEI. (Pleadings; 2:242, 316, 340-341) Semi-retired, owner Henderson has turned over the daily operations of CEI to his two sons, one of whom is Vice President Matt Henderson. (2:341) Jack Tunnell, the site supervisor for about the first 90 percent or so of the Duncan project, goes by the title of "Foreman." (2:242) It is a title that he has held for the last 20 to 25 (2:321) of the over 30 years (2:241-242) that he has worked for President "Bubbie" Henderson and CEI. Vice President Matt Henderson (Henderson) confirms (2:344) Tunnell's testimony (2:242, 316, 318) that Tunnell was in charge of hiring and firing at the Duncan site. Indeed, Henderson asserts that Tunnell had "complete authority." In short, the project was Tunnell's "baby to complete, so to speak." (2:344) In late April, when the project was down to four workers, Tunnell left for some other project and was succeeded by Jimmy Thompkins, another foreman. (2:243)

An alphabetized employment-history roster (GCX 17) in evidence (2:244, 315) reflects that a total of 59 employees (53 hires and 6 transfers from other CEI projects, and not including Foreman Tunnell) worked at one time or another on the Duncan project. (2:250) Aside from the six transfers, all the 53 others hired and who worked on the project were "walk-ins." (GCX 17) That is, they were applicants who came on the job in the mornings with their tools ready to go to work. (2:248) This does not mean that all walk-ins hired began work the same day that they were hired, for such did not occur. The walk-ins doubtlessly were generated by classified advertisements that CEI ran in *The Sunday Oklahoman* and in *The Daily Oklahoman* for ironworkers on November 8 and December 10, 1998 and January 5 and 10, 1999. (GCXs 2, 3, 6, 9)

<sup>1</sup>All dates are for 1999 unless otherwise indicated.

<sup>2</sup>References to the two-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's and RX for those of Respondent CEI. No exhibits were offered by the Union.

<sup>3</sup>The transcript incorrectly reflects a nonexistent "Barlow," Oklahoma. A check of the zip code provided by Rosier (73055 at 1:163) at the Postal Service's website, [www.usps.com](http://www.usps.com), discloses the correct name of Marlow.

The fact that the project was staffed mostly by walk-ins highlights a related aspect of Foreman Tunnell's hiring procedure — he hired on an “as needed” basis. (2:262, 267, 270, 293, 331) Tunnell testified that, under standard practice on construction jobs, the best time to get hired is to show up early on Monday mornings with all necessary tools and ready to work right then. (2:288, 319-321, 335) Additionally, Tunnell was a “one-man operation” in that he had no secretary, and he was almost always out on the jobsite around 5:30 a.m. and therefore not in his trailer office to answer any phone calls. (2:322-323)

Job applicants, including the four alleged discriminatees here, frequently gave Tunnell their telephone numbers. As Tunnell nearly always was out on the jobsite, frequently either he or the applicants (as in the case of the four salts here) had to write their phone numbers on scraps of paper which Tunnell kept until he could transfer the names and numbers to a master list (GCX 25) that he kept in his trailer office. (2:268, 301-302) Although Tunnell sometimes used this master list to call one of the applicants named there, and particularly did so in late January when it rained (2:295, 336), he found that “half” the numbers “would not go through” (2:275), so after that experience he simply quit using the list because he had more success at hiring walk-in applicants (2:304).

Because time was of the essence for Tunnell, when he did call he usually would call only once. (2:328) If he reached an answering machine, he did not leave a message because he wanted to contact someone then, not later, and, additionally, later might well come when he was out on the jobsite. (2:323, 328) Similarly, Tunnell left no callback number on pager numbers because he knew it was unlikely that he would be in his trailer office when a callback came. (2:296, 328)

Union organizer Norman made three trips to the Duncan jobsite and applied to Foreman Tunnell for work on CEI's Duncan project.<sup>4</sup> The dates were (1) Thursday, December 10, 1998, (2) Thursday, January 7, 1999, and (3) Wednesday, January 20. For the first visit on December 10, Norman took with him three ironworkers then on the Union's out-of-work list (OWL): salts Neal, Rosier, and Rowland. (1:42, 133) The same group also went to the Duncan jobsite on the January 7 visit. (1:65) When Norman went for the third visit, on Wednesday, January 20, he was accompanied only by Neal. (1:76)

Norman tape recorded the conversations he and the other three had with Foreman Tunnell on the three visits. (Owner “Bubbie” Henderson was present at Duncan during the second visit, on January 7, and his participation in the conversation is recorded.) The three audio tapes are in evidence (GCXs 4, 7, 10) as are their respective transcripts (GCXs 5, 8, 11). No party relies on any conversation with Foreman Tunnell that is not part of the taped conversations. To a substantial extent, both parties rely on the contents of the three transcripts, plus the two exhibits (GCXs 16, 17) showing names and dates of ironworkers on the job as proving, or disproving, the allegations of discriminatory bypassing of the four “open” salts. The salts were “open” because they wore union insignia and openly an-

nounced to Tunnell and to owner Bubbie Henderson that, if hired, they planned to organize on behalf of the Union at lawful times while the rest of the time they would be doing good work for CEI and thereby helping CEI to make money on the job. (Rowland, a traveler or “boomer,” did not wear any union insignia. 1:191)

### *B. General Chronology*

#### *1. The jobsite visit of December 10, 1998*

The Norman group of four arrived at the jobsite around 9:30 a.m., Norman testified. (1:41) The “contact sheet” (GCX 12), or file memo, that Norman later completed reports the arrival time as being about 10 a.m. (Norman's file memo was received on a limited basis, such as for clarification. 1:41) Foreman Tunnell places the time of their visits as about “mid-day.” (2:320-321) In the context of his testimony, I interpret his “mid-day” to mean not too long before the lunch break—such as about 11 a.m. Norman was a bit more specific in his time estimates, and on that basis I attach somewhat more weight to his time estimate. Even so, Tunnell testified with apparent sincerity on this point. Balancing the evidence here, I find the “Norman Four” arrived in the time frame of 10 a.m. to 10:30 a.m. when they came to the jobsite.

After the Norman Four found Tunnell on the jobsite, the essential parts of the conversation are as follows. Explaining that they had seen the newspaper ad, and confirming that they were ironworkers, Norman said that they had come to get jobs. To Norman's question of what CEI was paying, Tunnell responded that the rate would be anywhere from \$10 to \$14. Norman replied, “Okay—that's good, we'll work for that.” (GCX 5 at 1-2)

The talk then switched to qualifications. Norman said he had journeyman ironworker papers, and each of the Norman group declared that he was a certified welder. When Tunnell said that he needed ironworkers more than welders, Rosier declared that they had been doing “structural all our lives.” (GCX 5 at 2) It is pertinent to note here that each one of the Norman group had many years of experience as an ironworker—Norman, 30 years (1:28-29, 154), Rosier, 25 years (1:163), Rowland, 30 years (1:187), and Neal, 35 years (1:208).

Stating that he was overstaffed at the moment, with two additional workers to start the following Monday (December 14, 1998), Tunnell inquired whether they were all from “right around here.” Tunnell explained that he asked whether they were “local” so as to know whether they could come back. Tunnell said he needed about another week. “Like I say, if you live here local or it's not too much trouble about the end of next week, come by and see me. I mean, if there's a way you can leave me your number and I can call you.” (GCX 5 at 2-3)

Tunnell's references to the number of ironworkers assertedly scheduled to arrive (apparently not yet actually hired, but something more on the order of a moral commitment to hire them when they arrived) on Monday, December 10, 1998, were rather flexible. First it was “two more” (GCX 5 at 2), then “I don't know how many supposed to be in here already that we hired” (GCX 5 at 3), then (GCX 5 at 8) it was back to “two more,” with one of those to arrive “tomorrow” and the other on

<sup>4</sup>Norman actually went a fourth time, on February 12, but Tunnell was not there that day. (1:89-91)



Monday. At trial Tunnell's recollection was that he had said "I've got more guys coming in" on Monday, December 14 (2:253), and he later expands that to "quite a few," "could have been six, seven, eight" to report that following week (2:324). Testifying about this area before me, Tunnell appeared to be giving himself all the leeway he might need in the litigation. Thus, his credibility at trial generally was poor.

Norman replied that he [lived] "a little ways out," but that he could leave his number. To Norman's question about work available, Tunnell said that he would have to start another crane and hire an additional crew when he started a new wing on the building, and he referred to the fact that others hired had yet to arrive. Norman then launched the following exchange (GCX 5 at 3-6):

Norman: Well now we're all union ironworkers, and we'll make you good hands, that's no problem.

Tunnell: Now we're nonunion.

Norman: That's all right. We'll work for what you pay ... and we'll try to organize your company too, if we can.

Tunnell: You can forget that, I'll tell you that right now.

[I skip the next few lines which discuss, in part, that Tunnell lives in Virginia.]

Norman: John Hunter is our Business Agent down there [here], and if you need qualified hands we can get you some hands out here, all you need.

Tunnell: No. Reason I say that, bud, they tried it up there [Virginia area] out of Local 5 there.

Norman: We'll make you some good hands.

Tunnell: What the union pays out here I have no idea or nothing else.

Norman: We could work something out with the union if you run into a tight here, you know, get you some hands out, you know Fluor's got that job going on over in Lawton.

Tunnell: I'll be honest with you, the guy that owns the company, he don't like the union to start with.

Norman: Who's that.

Tunnell: Bubbie Henderson.

Tunnell: [After confirming that Henderson is a fair person, Tunnell continues.] He is—he don't like the union the way they done around where we're at. Where we do most of our work, O.K. Up there and like I say I don't know how it is out here. I don't have no idea. I don't like to talk about anything or anybody, but see, up there if you're in the clique you can work. If you're not in the clique, you might work a month and then lay you off 6 or 7 months.

Tunnell: How in the hell will they let you work nonunion?

Norman: Cause we're volunteer organizers. And I am an organizer.

Moments later Norman asks whether it would do any good for him to talk with owner Bubbie Henderson. Apparently indicating a negative, Tunnell adds that the reason owner Bubbie Henderson would not hire Norman or his group is because (GCX at 7):

He is strictly against the Union, and this is all from back there [Virginia].

A few lines later Tunnell told the group to leave their phone numbers, adding (GCX 5 at 7):

I have nothing against unions or nonunion. Look at it this way, a man's got to work to make a living, you know what I'm saying?

After some discussion about the nature of the job, and as the Norman group prepared to leave, Norman makes a reference to the Union's having some "good hands" available for hire if CEI runs short and needs them. Tunnell responds (GCX 5 at 8):

Tunnell: Like I said, I'll be more than glad to, you know it don't matter to me. The only thing I ask if I hire you, don't start trying to screw up all the others. I mean you can ask them, I don't care if you ask them. I mean it's up to them. But as far as the company goes, they will not go union.

Norman: Appreciate your time. If you can use us give us a call.

Tunnell: Like I say, it will be a little while. I know of two I think two more coming in. One supposed to come in tomorrow and one on Monday, and I'll have enough to do this wing right here.

There is no dispute that those in the Norman Four group wrote their phone numbers for Tunnell either on slips of paper, or on a sheet of paper, there on the jobsite. Whether they included their area codes is disputed, with the Norman group (with the probable exception of Rosier, 1:168-169) asserting that they did,<sup>5</sup> and Tunnell emphatically claiming (2:301-302) that they did not. Harold Rosier lives at Marlow, Oklahoma, about 17 miles north of the jobsite. Rosier could not recall whether he left his area code when he left his phone number. (When asked at trial what he left, he gave his phone number without the area code. 1:169) Most likely he did not, for he really was a "local," with his area code of 580 being the same area code for Duncan. (1:169; 2:298-299) The other three probably would have so that they could receive a call. Thus, Samuel Rowland was living in Newcastle (1:187, 195), a town about 20 miles south of Oklahoma City (1:190-191). His area code is 405, the same as that for Oklahoma City. (1:60, 195) Neal's home is in Norman. (1:207) Like its Newcastle neighbor, Norman, as an atlas reveals, is some 15 to 20 miles south of Oklahoma City, and Neal's area code there is the same as that for Oklahoma City—405 (1:215).

Aside from the probability that Rosier did not leave his area code, and that the others did leave theirs, we need to consider Tunnell's "master" list (GCX 25). The list in evidence (GCX 25), a photocopy, should have been the original, for there is some question about the reliability of this list. Thus, the list consists of a single letter-size sheet of paper with two columns. The left column has the names (not alphabetized) and the right column their telephone numbers. There are 24 single-spaced names. After a line is skipped, the names of the Norman Four are listed, making a total of 28 names on the list. Everything is in Tunnell's hand.

For the first group of 24 names, the phone numbers show the area codes. Most of the codes are 580, but five show 405. Only the five digit numbers (no area codes) are shown for the Norman Four. Oddly, the numbers for the Norman Four are closer to the names than the numbers for the other 24. That is, the numbers of the two groups are not in vertical alignment. It

<sup>5</sup>Norman (1:60), Rowland (1:195), and Neal (1:215).

is as if the Norman Four were added at some point after the list had been prepared. Foreman Tunnell testified that many of the applicants would write their names and phone numbers on scraps of paper, and that Tunnell later transferred these names and numbers to the master list. Tunnell does not retain the scraps of paper. (2:268, 301, 310-311) When an applicant said that he was a “local” call, Tunnell would write in “580” for the area code. (2:303) Yet the Norman Four do not have area codes by their names. As noted earlier, Tunnell claims that such is because they did not furnish such. (2:301-302) Not crediting Tunnell respecting this, I find that the Norman Four (with the exception of the “local” Rosier) did include their 405 area code when writing and submitting their phone numbers to Tunnell on December 10, 1998.

Moreover, the Norman Four have hand-drawn brackets around their names and numbers. Tunnell explains that he added that after the unfair labor practice charge was filed and CEI’s corporate office apparently called for him to send in the list. (2:310) I find Tunnell’s “master” list (GCX 25) to be an unreliable document. Assembly of the telephone list was subject to manipulation, and the exhibit in evidence, not being the original, prevents us from examining Tunnell’s original writing to determine whether the inked entries of the Norman Four appear different in age or ink color from the first group of 24.

## 2. Applicants beginning work December 10–31, 1998

Turn now to the hiring calendar in evidence (GCX 16). As the calendar reflects, no one was placed on the payroll (first day on the job) on December 10, 1998. The next “new hires” had their first day on the payroll the following Monday, December 14, when Randall Bulla, Gary Towell, and John R. Turner reported to work. Bulla’s application and W-4 form are dated December 21. (GCX 19) Turner’s application (GCX 18) is dated (Sunday) December 13, 1998. (2:256) Towell’s papers are not in evidence. On brief, the General Counsel focuses on Turner, and suggests (Brief at 7) that, despite Tunnell’s December 10 statements (GCX 5 at 2) to the Norman Four that two others already were scheduled to arrive by Monday (December 14), as noted earlier, Turner ostensibly was not actually hired until Sunday, December 13. That probably is so notwithstanding Tunnell’s testimony (2:253) that he already had offered employment to several workers. (I do not credit Tunnell as to this. First, he rambled as to the numbers he expected, second, on the audiotape transcript he does not claim to have actually offered employment, and third, his demeanor was unfavorable here.) Nevertheless, I find that, before December 10, Tunnell had made a moral commitment to hire those employees who started work on Monday, December 10.

The only other hire the rest of December was Keith Dixon on Wednesday, December 16—that date being his first day on the payroll. (GCX 16 at 1) Dixon’s application is dated December 12, while his W-4 form is dated (Friday) December 11 (GCX 20). (2:259) Although Dixon’s application does not reflect any experience as an ironworker (2:261), Tunnell admits that he never questioned Dixon about the absence of such a showing, and Tunnell asserts that Dixon did perform ironwork for CEI on the Duncan project (2:261). Moreover, Tunnell concedes that Dixon probably came in “that morning, ready to go to

work.” (2:262) Indeed, the project data exhibit (GCX 17 at 1) reflects that Dixon was a “walk-in.” Presumably “that morning” was Friday, December 11, the date on his W-4 form.<sup>6</sup> Thus, contrary to Tunnell’s testimony that he hires employees “as I need them” (2:262, 267, 270, 293), he clearly hired Dixon on Friday, December 11—the day after he told the Norman Four, who had many years’ experience as ironworkers—that he was overstaffed and to give him a week. Moreover, by Tunnell’s own account (2:262) and CEI’s own project data document (GCX 17), Dixon was someone who walked onto the job “ready to go to work.” That is, he was not one whom Tunnell had made an earlier moral commitment to hire.

The Norman Four also ostensibly “walked onto the job ready to go to work.” Nothing in the record indicates that the Norman Four were not ready to work. Tunnell never inquired whether they had their tools with them. Even if they did not, Tunnell could have hired one, or considered one or more for hire, right then for reporting to work the following day. Tunnell clearly gave Dixon several days before he was to report to work, not to mention the moral commitment earlier made to those who reported to work on Monday, December 14. In fact, Tunnell concedes that applicants sometimes say that their tools are on another job. Giving them the benefit over his doubts as to whether they really want a job, Tunnell tells them that they can report the next day. (2:333-334)

Respecting Tunnell’s master telephone list, Tunnell testified that he did not know whether Dixon was on it. (2:262) Dixon’s name is not on the list. (GCX 25) Asked whether he called [any of] the Norman Four before offering Dixon a job starting in the middle of the following week, Tunnell answered, “Why would I call them? They was on the bottom of the list.” (2:262) As noted earlier, I assign little, if any, weight to the master telephone list because the original appears to have been a document that was subject to easy manipulation, and the record contains not the original (so that text, color of ink, and such) could be inspected, but only a photocopy that will not show most such matters. In short, the Norman Four appear at the bottom of the list, but in the fashion that they are listed, the suggestion is that their names were placed on the bottom only when the list was assembled in response to the unfair labor practice charge filed in this case. None of the 28 names on the list (GCX 25) has an entry showing for the date each applicant’s name was placed on the list or when he first came to the jobsite seeking work.

## 3. The jobsite visit of January 7, 1990

Recall that on Tuesday, January 5, 1999, CEI ran the following ad in *The Daily Oklahoman* (GCX 6):<sup>7</sup>

**IRON WORKERS**  
Exp. on structural steel for

<sup>6</sup>That date fits perfectly with the December 10 ad (GCX 3) by CEI in *The Daily Oklahoman* for ironworkers at the Duncan project. It advised applicants to call [Virginia] for directions to the site. “Plenty of overtime” touted the ad.

<sup>7</sup>The same ad also appeared in the 1-10-99 edition of *The Sunday Oklahoman*. (GCX 9)

FAMILY DOLLAR  
project in Duncan, OK. Apply  
at Family Dollar site, 203 E. Cherokee  
Road, Duncan. See Jack.

The next day, CEI hired (first day on the job) Chris French (GCX 16 at 2), a “walk-in” per the project data exhibit (GCX 17 at 2) and Tunnell (2:325). On Thursday, January 7, the Norman Four returned to the jobsite, all wearing union-marked clothes. (1:65, Norman) As soon as Norman and Tunnell had exchanged a quick greeting, the next part of the conversation was (GCX 8 at 1):

Norman: Didn’t hear from you. Saw your ad in the paper.

Tunnell: It’ll probably be next week.

Norman: Next week.

Tunnell: I’ve still got your names.

Norman: Do you.

Tunnell: Oh yeah, I’ve still got them. I’ve still got them.

Norman: Well, saw your ad in the paper. That’s why we came down. Looks like you’re getting it on down.

Tunnell: We’re still having trouble getting the iron.

Tunnell: Soon as I get ... (Inaudible). Yeah, I’ve still got you guys’ names. I’ve had a lot of guys coming in. (Inaudible) I’ve got everybody’s names down. Quick as I can, I’ll give you a call.<sup>8</sup>

Monroe Neal brought up the topic of Virginia. A moment later owner Bubbie Henderson, who perhaps had been standing there, responded and engaged in conversation with Neal about Virginia. After some of this, owner Henderson asked Rosier and Rowland their names, which they gave. Norman then turned the conversation as follows (GCX 8 at 3) (with some punctuation and spelling modified for easier reading):

Norman: We’re all union ironworkers.

Bubbie: You are—that right.

Norman: Hey now. We’ve got some good hands here you know. You run into a problem we can help you out I’m sure.

Bubbie: We can’t use union help. I mean we can hire you but we can’t pay the union benefits.

Norman: That’s all right. We’ll work for you.

After further conversation Norman tells Bubbie Henderson that they would make him “good hands,” and that if owner Henderson would “give us a shot at this,” they would make him “proud of us.” (GCX 8 at 4) To that Bubbie responded, “Tough schedule here. Lots of overtime.” Rowland remarked, “We can handle that.” The conversation then ended by Norman’s, “Jack’s got our number and everything. Nice talking to you.” The transcript closes with owner Henderson’s, “All right.” (GCX 8 at 5)

Turn again to the hiring calendar (GCX 16). It shows that new hires (first day on the job/payroll) as follows from early January 7 through January 19:

Monday 1-11-99	Tuesday 1-12-99	Wednesday 1-14-99
Reagan Burge Sean Jarvis Shawn Scarbrough	Brian Allison	George Skitt

Monday 1-18-99	Tuesday 1-19-99
David Cadell Gerald Mason James Mathers Justin Zimmerman	Donald Keener

James Thompson also came in on Monday, January 18, but he already was a CEI employee who was transferred to the job, apparently as a crane operator. (GCX 17 at 4; 2:248) He also may have held the status of foreman for CEI. (2:283, 326) In any event, he succeeded Tunnell as the project foreman when Tunnell left in late April. (2:243)

Reagan Burge’s W-4 form and application (GCX 22) are dated January 9—2 days after the Norman Four’s January 7 visit to the jobsite. His application reflects that in early January 1999 Burge was about to turn 22, that he had taken vocational training in welding and auto mechanics, and that his work experience had been as a laborer. He listed his address as Ryan, Oklahoma—some 35 miles south of Duncan per an atlas. Tunnell does not recall anything about Burge, who left (GCX 16 at 2) after just one day on the job. (2:271-272, 325)

Sean Jarvis is listed in seventh place on Tunnell’s so-called “master” telephone list. (GCX 25; 2:325-326) His W-4 and application are dated January 11. (GCX 21) His application lists his home address as Foster, Oklahoma—a town, per an atlas, about 35 miles east by northeast from Duncan. Tunnell agrees that the application of Jarvis shows no ironworking experience, but states that he hired Jarvis because he had some welding background, he appeared willing to work, he had come to the jobsite seeking work four or five times, and he hired Jarvis as a laborer although he did some welding on the job. (2:264-265, 325) Tunnell does not recall whether Jarvis reported in response to a telephone call from Tunnell, or whether Jarvis simply came to the jobsite and was hired. (2:266-267) The project data document lists Jarvis as a “walk-in.” (GCX 17 at 2) Tunnell did not call any of the Norman Four, in light of their welding experience, because, Tunnell asserts, Jarvis was ahead of them on the telephone list. (2:267) Tunnell adds that he hires employees as he needs them, and that he gives preference to walk-ins, who are ready to work, over those on the telephone list. (2:267-268)

Shawn Scarbrough, in tenth place on the telephone list (GCX 25; 2:326), was a laborer. (2:270, 273-274) His W-4 and application (GCX 23) are dated January 7 (the very day of the Norman Four’s visit), and his application reflects a home address at Duncan. His only training or experience is shown as work related to carpentry. (2:274) He was a “walk in.” (2:274; GCX 17 at 3) Tunnell does not recall whether he telephoned Scarbrough, and asserts that Scarbrough could have obtained his application and brought it back the next day. (2:275-276) Tunnell assertedly did not think that any of the

<sup>8</sup>I have slightly modified the phrasing, but not the meaning, of this passage by Tunnell to conform it more to how he probably phrased it. The tape has a lot of noise at this point and it is very difficult to understand the exact words.

Norman Four, with their many years of experience, would “stoop” to do laborer’s work on the project, even though they said that they would work for \$10 an hour. (2:290) Tunnell testified that laborers such as Scarbrough were paid about \$8.00 per hour. (2:263) Tunnell explains that everyone on any ironworker job is listed as an ironworker (except the crane operators), and that such is how the laborers are listed on the project’s papers here. (2:247, 263, 280)

There are no papers in evidence respecting Brian Allison. The project data exhibit shows that Allison was hired on Tuesday, January 12, as a walk-in, and that CEI could not locate his date of application. (GCX 17 at 1) Allison is not named on Tunnell’s telephone list. Tunnell testified that Allison came on the job with his tools the same morning that two others quit and that Tunnell hired Allison, who had experience as a welder and as an ironworker, on the spot. (2:276-279, 326)

On Thursday, January 14, Tunnell hired George Skitt, who walked on the jobsite ready to go to work, as a laborer at around \$8.00 to \$9.00 an hour. Skitt filled out an application the following day. (2:279, 326; GCX 17 at 3)

As reflected in the table above, the following Monday, January 18, and not counting James Thompson, four new employees had their first day on the job/payroll. A walk-in (GCX 17 at 1), and in fourth place on the telephone list (GCX 25; 2:326), David Cadell worked as a laborer initially and then was switched to operating a forklift, which was the basis for his hourly starting pay of \$10.00. (2:280-281, Tunnell)

Gerald Mason was a walk-in (GCX 17 at 2) whom Tunnell could not remember. James Mathers, another walk-in (GCX 17 at 2) who had no ironworker experience, did ironwork, but it was the “bottom end” work of “screwing” (laying) deck. (2:282, 327, Tunnell) Respecting such work of laying deck, on December 10 Norman told Tunnell that, although he did not like to do that work, he would do it. (GCX 5 at 3; 1:148) [If Norman is willing to work at laying decking, he missed an opportunity to apply specifically for such work. Thus, in visiting the jobsite on February 12 with Rosier, and learning that Tunnell was not there, Norman and Rosier were told that help probably would be needed to lay deck, and that Tunnell would return on Monday. Norman did not return to the jobsite. (1:90, 154).]

Starting as a laborer at \$8.00 per hour, walk-in Justin Zimmerman, who worked on the job for about 3 months, eventually did some ironwork. (2:280; GCX 17 at 4) Except for James Mathers, the applications of the other three of the Norman Four were dated their first day, January 18 (GCX 17); Mathers’ was dated January 17. (GCX 17 at 2)

Donald Keener, a walk-in whose application and first day on the job bear the same date of January 19 (GCX 17 at 2), did welding. He previously had come to the jobsite several times seeking a welding position. (2:283-284, Tunnell)

No new employees joined the payroll on Wednesday, January 20, but on that date Norman and Neal went to the jobsite.

#### 4. The jobsite visit of January 20, 1999

When Norman and Neal arrived at the jobsite on Wednesday, January 20, they learned that Neal could not go in because he had forgotten to bring his hard hat. (1:78-79, Norman;

1:221, Neal; GCX 11 at 1) Norman and Neal arrived at the jobsite about 10:15 a.m.

[When shown his file memo (GCX 14) to refresh his recollection, Norman inadvertently focused on the time of 8:30 a.m. as the arrival time. (1:75) In a post-trial stipulation, that I now approve, the parties stipulated that the correct arrival time was (about) 10:15 a.m., and that no negative inference is to be drawn from Norman’s mistake as to the arrival time. To reflect this stipulation, I receive as part of the record, attorney Kollman’s letter of May 24, 2000 (JX 2), a copy of my May 24, 2000 memo to counsel with Mr. Kollman’s faxed return note of May 24 joining the stipulation (JX 3), and attorney Williams’ May 24 letter (JX 4) outlining and joining the stipulation.]

The transcript of the tape recording for Norman’s January 20 visit reflects that when Norman reached Tunnell the conversation, after a very brief greeting, developed as follows (GCX 11 at 3):

Norman: You never called us, Bud.

Tunnell: I ain’t needed nobody yet, but I’m going down the list that I had with your names. You got about one, two, about four more ahead of y’all yet.

Norman: O.K. Looks like you moving all pretty good.

Tunnell: But, I’ve got everybody I need right now; so I ain’t calling nobody.

Norman: O.K.

Tunnell: So, there are about 4 guys ahead of y’all yet and that’s all. Then y’all are next. I tell you, I write down everyone’s name as they come, that way I don’t slight nobody.

Norman: Right. How many you got working for you now?

Tunnell: About 19-20.

After a brief exchange about how many ironworkers that Tunnell would need at “the T” (apparently where the building wings join requiring, it seems, the most workers), Tunnell answered “about 20,” but that he does not know who is going to quit—suggesting, it would appear, that he might need to hire a total of more than just one additional ironworker.

Tunnell then (GCX 11 at 4) repeated that the Norman Four had “about 4 more ahead of y’all yet.” As Ironworkers quit, Tunnell calls down the list. If they do not come in, “I just cross them off and move right on down the list. Chuckling, Norman replied that if CEI had signed with the Union, “the Union would have sent CEI all the ironworkers CEI needed, and they would have been good, qualified ironworkers. To this Tunnell responded (GCX 11 at 5):

Tunnell: Let me ... I’ll tell you where I am, seriously. The Union is fine. Personally, myself, I don’t like them. You know why? The way they done us up in DC.

To Norman’s assurance that his Local was not that way, Tunnell replied that he was not saying it was, but that he was explaining why he can make more money nonunion than he can working union. Tunnell stated that he had “nothing against union.” This was followed by a few “inaudible” words, ending with “make good money.” (GCX 11 at 5)

As the conversation concludes, Norman admits that “we’ve got to get that bad taste out of people’s mouths anyway,” to which Tunnell asserts that the Local in the mid-Atlantic area

had “screwed themselves up there. I’ll be honest with you, they really did.” Norman tells Tunnell to “Give us a call if you need us.” Tunnell responds, “I sure will. Like I say, I’ve got your names. I ain’t slighting nobody.” With a final short goodbye, the conversation ended. (GCX 11 at 6)

The following “new hires” began their first day on the payroll between January 20 and the end of the month: January 20 and 21, none. Friday, January 22, one, David Anderson. (GCX 16 at 2) Three terminations that day included Anderson who was injured after just 1 hour on the job. (2:289-290, Norman) Anderson, a walk-in, never completed an application. (GCX 17 at 1)

The next person hired was Marty Tate, a walk-in whose first day was Monday, January 25. His application was dated Tuesday, January 19, and he worked just 3 days. Tunnell indicates that Tate, who was working as a laborer, left because he probably was scared to work “in the air.” “That’s what gets a lot of them,” they are just “scared of heights.” (2:290, 292-293, Tunnell)

Derrick Rogers, a walk-in, had his first day on the job on Tuesday, January 26, the same date as his application. (GCX 16 at 2; GCX 17 at 3) Tunnell recalls that Rogers, hired at about \$9.00 per hour, did laborer work plus some welding not requiring certification. Later his pay perhaps reached \$10 per hour. (2:291)

Robert Brown, the last person hired in January (and who left on February 1), was a walk-in who application was dated the same date as his first day on the job—Wednesday, January 27. (GCX 16 at 2; GCX 17 at 1) Tunnell asserts that he cannot recall Brown and does not know whether Brown did ironwork or laborer work. (2:291-292) Despite Tunnell’s assertion to Norman on January 20 that he was calling off his telephone list, none of these four new hires (Anderson, Rogers, Tate, or Brown) is named on Tunnell’s telephone list. The applications for none of these new hires is in evidence. Even so, it seems that Brown likely is another of those who were afraid of working “in the air.” As Tunnell recently told one such worker (2:292-293):

You have no business whatsoever being in this business, because, you know, that’s what you do. You have to go up in the air.”

During January 1999, CEI hired 16 “ironworkers” (as all other crane operators are classified, and exclusive of James Thompson) at the project. In February and March to Tuesday, April 6, the last day anyone was hired for the project, others were hired—11 in February, 14 in March, and 1 in April. (GCX 16 at 3-7) During the same period, others left the job.

#### 5. Tunnell makes calls on January 29, 1999

Because heavy rain washed out work for Friday, January 29, Tunnell assertedly made calls from his trailer office to those on his telephone list—including, he thinks, the Norman Four—for he knew that he would be needing some more workers. (2:295-296, 303, 329, 336) Tunnell reports that he had no success reaching anyone he called that day. Some calls “did not go through,” and others were pagers or answering machines. He made no long distance calls that day. (2:299-300) Tunnell

thereafter quit using the list because he had better success depending on walk-ins. (2:304)

As for the Norman Four, Tunnell assumed that they lived in the geography of area code 580 and so his calls that day were local. (2:329) As earlier noted, Norman, Rowland, and Neal had 405 area codes, but Rosier did live locally (only 17 miles from the project), and any call to just the last seven digits of his number would have reached his house. Although Rosier had no answering machine (an apparently irrelevant fact as Tunnell asserts that he left no messages anyhow), his wife nearly always is home, she regularly reports calls, yet she never reported a call from Tunnell. (1:170-171)

### C. Discussion

#### 1. Allegations of coercion

##### a. Threat not to hire

Complaint paragraph 5(a) alleges that, about December 10, 1998, Foreman Tunnell told “employee/applicants that they would not be considered for employment or hired because of their Union affiliation.” CEI denies. The Government apparently relies on Tunnell’s statements the Norman Four could forget about organizing CEI because CEI’s owner, Bubbie Henderson, did not like unions because of the treatment he had received from Local 5 back in the Virginia area. Also, in response to Norman’s question, Tunnell advised against Norman contacting owner Henderson directly, stating, “I’ll tell you why, if you talked to him he wouldn’t hire you. I’m just being honest. He is strictly against the Union, and this is all from back there.” And near the end of the conversation, Tunnell said, “... as far as the company goes, they will not go union.”

Contending that the evidence fails to support the allegation, CEI points to Tunnell’s several statements confirming that “a man’s got to work to make a living” (GCX 5 at 6), and “I have nothing against unions or nonunion. Look at it this way, a man’s got to work to make a living, you know what I’m saying,” (GCX 5 at 7), and that (GCX 5 at 8) he would be more than glad to hire any union members, and the Norman Four could ask the other employees to join the Union, but that it was up to the other employees as to what they wanted to do, although the company itself “would not go union.”

CEI observes that it was Tunnell, not owner Henderson, who was responsible for the hiring on the project. (2:242, 316, 318, Tunnell; 2:344, Vice President Henderson). Tunnell advised the Norman Four against going to the owner to get hired. Norman recognized that Tunnell was trying to help him, and at that point Tunnell believed that Tunnell was prepared to hire the Norman Four even after he advised them not to speak to owner Henderson. (1:103, 139-140)

Agreeing with CEI, I find no threat that CEI would not consider or hire the Norman Four because of their union affiliation. Tunnell was saying just the opposite, while candidly attempting to alert them to avoid contacting the owner because the owner did not like unions and it was the owner who would not hire them. Instead of pointing to the owner, the allegation is in the generic. By its generic focus, the allegation needed supporting evidence that Foreman Tunnell was bound to follow owner

Henderson's wishes. As there is no such evidence, I shall dismiss complaint paragraph 5(a).

*b. Threat of futility*

Complaint paragraph 5(b) alleges that, also about December 10, Foreman Tunnell told "employee/applicants that it would be futile for them to select the Union as their exclusive bargaining representative." CEI denies. Presumably the General Counsel relies on Tunnell's statements to forget about organizing (GCX 5 at 4) and (GCX 5 at 8), "... as far as the company goes, they will not go union." These statements are to the effect that CEI does not need or want a union, will not voluntarily recognize a union, will lawfully resist any organizing effort, and, should a union win an election, will bargain hard but within the law. Such statements are protected by Section 9(c) of the Act. Accordingly, I shall dismiss complaint paragraph 5(b).

2. Allegation of discrimination

Since about December 10, 1998, complaint paragraph 6(a) alleges, CEI "has refused to consider for hire and/or hire employee-applicants" John Norman, Monroe Neal, Harold Rosier, and Sam Rowland. It so refused because, complaint paragraph 6(b) alleges, of union considerations. CEI denies.

The General Counsel contends, in effect, that Foreman Tunnell merely strung the Norman Four along with false assurances that they would be called, and that this was just a stalling tactic, while CEI all the while continued to hire employees without ever calling any of the Norman Four. Given Tunnell's personal animus against Iron Workers Union Local 5, his assurances were nothing more than pious mouthings calculated to persuade the Norman Four to go away.

Disputing the Government's stalling argument, CEI argues that the salts simply wanted, in effect, to make "virtual reality" appearances at the jobsite—while others competing for any available openings physically appeared and applied. When this "virtual reality" procedure failed to produce job offers (because Tunnell gave first preference to those who were standing before him rather than to those on a telephone list), they claimed discrimination. The fact is, many of those hired came several times, thereby not only demonstrating a real interest at being hired, but, more important, being the applicant on the scene when Foreman Tunnell actually needed someone.<sup>9</sup> Thus, notwithstanding what appears to be some misleading or even false statements by Tunnell to the Norman Four, the Norman Four never really tested CEI by making frequent appearances at the jobsite seeking work.

Moreover, when the Norman Four came, they came on days and at hours that were not the most favorable. Granted, a few

others started in the middle of the week, but the point is that experienced ironworkers must surely have known that, in the construction industry, the most favorable time for seeking work is to arrive early—early in the week and early in the morning, ready to go to work. Again, by failing to arrive early and often, the Norman Four failed to put CEI to the test. The circumstances here may appear suspicious, but suspicion is not enough.

Foreman Jack Tunnell was not generally credible, he could have offered helpful suggestions to the Norman Four on when and what time to come seeking work (but was under no obligation to do so), and he made misleading, even false, statements to the Norman Four. Still, all of this fails to show that CEI discriminated against the Norman Four by excluding them from the hiring process or that CEI was hiring when the Norman Four applied, yet failed to hire the Norman Four for animus-based reasons. The central fact remains that the Norman Four, coming so infrequently, failed to arrive when CEI was hiring or taking applications.

Accordingly, finding that the Government has failed to establish, by a preponderance of the evidence, a prima facie violation of the Act, under the tests recently enunciated by the Board,<sup>10</sup> I shall dismiss complaint paragraph 6. As that dismisses all the unfair labor practices alleged, I therefore shall dismiss the complaint.

CONCLUSIONS OF LAW

1. By statements made by Foreman Jack Tunnell at CEI's Duncan, Oklahoma jobsite on December 10, 1998, CEI did not violate, as alleged, Section 8(a)(1) of the Act.

2. The Government has failed to show by a preponderance of the evidence that, prima facie, CEI (as alleged) since December 10, 1998 has refused to consider for hire and/or hire employee-applicants John Norman, Monroe Neal, Harold Rosier, and Sam Rowland because of their affiliation with and support of the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

ORDER

The complaint is dismissed.

<sup>10</sup>See *FES* (A Division of Thermo Power), 331 NLRB No. 20 (2000).

<sup>11</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, 29 CFR 102.46, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, 29 CFR 102.48, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>9</sup>In any event, several of those Tunnell hired were hired as laborers at rates of \$8.00 to \$9.00 per hour, well below the \$10 minimum the Norman Four were seeking for journeyman work.